No. 3995

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY S. FLEMING,

Appellant,

vs.

MONTANA COAL & IRON COMPANY,

Appellee.

BRIEF FOR APPELLEE.

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In this case the appellant seeks to enjoin the appellee from using its surplus funds in the purchase and retirement of its own bonds at prices lower than, and in a manner different from, that provided in the compulsory retirement clause of the trust mortgage securing such bonds, which is referred to in the pleadings and the brief for the appellant as section 29.

As counsel for the appellant clearly state under point 2 of their brief, and restate many times throughout their argument, the rights of the mortgagor and of the bondholders in this regard are governed solely by the terms of the trust mortgage and bonds which constitute

the contract between these parties. Therefore the rights of the appellant in this case are solely dependent upon the terms of this contract.

If the action of the appellee corporation in bargaining with the individual bondholder for the purchase or redemption prior to their maturity of the bonds held by him abrogates, or conflicts with, none of the rights guaranteed the bondholders in general under the terms of the mortgage or bonds, certainly there is no rule of law or public policy which would forbid such action.

American Etc. Co. v. N. Y. Ry. Co., 277 Fed. 282.

Barry v. Missouri Etc. Co., 34 Fed. 829.

Jones on Corporate Bonds and Mortgages, Sec. 325.

Is there any provision of the contract, which, fairly construed, would prevent such action by the appellee and afford a reasonable ground for appellant's complaint?

In the pleadings filed in this suit and in the brief for appellant, three clauses in the trust mortgage are referred to and quoted. One of these is the provision for maintenance of a sinking fund and the expenditure thereof by the trustee for the redemption and retirement of bonds in the manner therein provided. At page 11 of their brief counsel for appellant admit that the defendant has complied with the terms of the sinking fund provisions and therefor no further consideration need be given thereto.

The first paragraph of the mortgage upon which counsel for appellant rely in this suit is the provision contained on page 20 of the mortgage and quoted at page 15 of the brief. This provision is a recital obviously referring to the property mortgaged as security for the

bonds, and simply meaning that the property covered by the mortgage is to be held for the payment of all of the bonds and that no bond shall by reason of its date, number or series of issue have priority over any other bonds secured by the same mortgage in the application of such property to the payment of the indebtedness. It is true that the bonds are ratably secured by the mortgage but only as to the property pledged as security. The company did not pledge its earnings otherwise than to the extent covered by the sinking fund provisions. Therefore, certainly where the appellee out of its surplus funds purchased the bonds owned by individuals, such action constituted no preference as to the remaining bonds secured by the mortgage, within the terms or contemplation of the provision referred to.

It will hardly be contended that the appellee does not have the right to use its net earnings as it may see fit, so long as the sinking fund is maintained in accordance with the terms of the mortgage. It might use its net earnings to purchase other property, for development work, for the purchase of coal cars, or in distributing increased dividends to its stockholders. Such use would in nowise increase the security for the unpaid bonds or be of any benefit to the bondholders. The net earnings of the company, not being pledged to the payment of the bonds except insofar as is necessary to comply with the sinking fund provisions of the mortgage, may be used by the appellee without regard to the provisions of the mortgage. Having the right to use such earnings as appellee may see fit to do, surely it should have the right to use such net earnings in buying up and canceling its

mortgage debt and thereby increase the security for the payment of the unpurchased bonds.

It is not stated in the bill of complaint that the appellant was not given an opportunity to sell his bonds to the appellee on the same terms and conditions that the other bonds were purchased and retired out of the net earnings of the company, so there is no showing that he has been discriminated against by the appellee.

The second provision referred to, being contained in paragraph 29 of the mortgage, gives the appellee corporation the right to advance the maturity of all or any portion of the bonds in the manner and by paying the price therein provided. It is contended by counsel that this, aside from the sinking fund provision, provides the only method by which the appellee can retire its bonds prior to their maturity; that it is exclusive, and if the mortgagor wishes to retire its bonds, it must follow the method provided in this section.

The reason for, and intent and the meaning of the clause in question seems to us to be too clear to require argument or explanation. As argued by counsel and held by the cases they cite, a corporation cannot compel a bondholder to accept payment of his bond before maturity against his objection, unless such payment is made in accordance with a particular provision of the bond and mortgage. This, of course, is elementary. If the mortgage involved in this action did not contain provisions similar to those set forth in paragraph 29 thereof, the appellee corporation could not of right redeem any of its bonds prior to their maturity save through the sinking fund plan. The provision in question simply

gives the corporation the right to compel a bondholder to accept payment before maturity and in compensation provides that such bondholder so forced to accept payment shall receive an additional five per cent. upon the face of his bonds as consideration for the advanced termination of his investment. It confers upon the mortgagor a right or privilege which would have been wanting in its absence and which is provided as an exclusive method for compelling unwilling bondholders to relinquish their investments; but that is all, and there is no word or expression therein contained showing or tending to show that the corporation is thereby precluded from adopting any other method of purchasing its bonds.

Therefore, inasmuch as the action of appellee conflicted with no provision of the contract in question, appellant has no ground for his action herein.

II.

If we were to admit that the action of the appellee in the matters complained of did conflict with the wording of the provisions referred to by counsel, we would still insist that the appellant has failed to show himself entitled to the relief sought.

That injunction is an extraordinary remedy is elementary and as is suggested by the learned trial court in this suit, it is not a remedy to be granted easily and lightly at the mere request of a litigant. To entitle a party to injunctive relief, it must appear that, without it, some real and substantial right will be invaded and that he will suffer an irreparable injury.

On the other hand, if it does not appear that there is at least a reasonable probability that the granting of the

injunction will be effective and result in some benefit to the applicant, there is no reason that we know of why injunction should issue, for if the issuance of the injunction brings no relief, there is no reason for its issuance.

"A mere possibility or anything short of a reasonable probability of injury is insufficient to warrant an injunction against any proposed use of property by its owner. Injury, material and actual, not fancied or theoretical or merely possible, must be shown as the necessary or probable result of the action sought to be restrained. The disposition of the courts as well as of the legislative branch of the government in recent years has been to limit rather than to extend the use of the injunctive arm of the courts—to limit the use to cases where such use is necessary in order that real and substantial injury to rights or property of an imminent and probable character may be prevented." In re Penn. Dev. Co., 220 Fed. 225; Loring v. Waldron (Cal.) 31 Pac. 54.

Admitting for the moment that the action of the appellee in purchasing its own bonds at par or less from holders willing to sell in conflict with some provision of the contract between the parties, what property or right of the appellant is injured or invaded thereby?

It is admitted that appellant's security is measurably increased rather than impaired by such action, for, of course, the retirement of every bond from sources outside of the property pledged increases the proportion of the pledged property securing the bonds left unpaid. It does not change the maturity of appellant's bonds and, under the authority of cases cited by appellant, it will not be permitted to affect the chance of their retirement

under the sinking fund plan provided in the mortgage. If foreclosure of the trust mortgage should ever become necessary the action of the company in this regard could not operate to prefer any bondholder in the application of the property pledged. It is expressly admitted that the corporation is observing all of the terms of the sinking fund requirements and it is not contended that the corporation is insolvent or in dangerous financial condition.

Counsel do not contend that the provisions of section 29 of the trust mortgage place any obligation upon the appellee to invest its surplus funds in the retirement of its bonds under the plan thereby provided. If the appellee sees fit, it may devote such surplus funds to the payment of dividends, additions to, or betterment of its properties, or may expend the same in any other proper way it sees fit. Indeed, we get the impression from page 13 of the brief for appellant that it is admitted that the appellee might purchase its bonds and hold the same uncanceled in its treasury, and thus, in effect, accomplish by indirection what is now complained of.

It is impossible to point to any real right guaranteed the appellant under the terms of the contract in question which is invaded or impaired by the action of the appellee.

The only argument advanced by counsel is that if the appellee **should** seek to retire its bonds under the provisions of section 29 of the mortgage, there would be a **chance** that his bonds **might** be drawn in the lottery. It is not contended that the appellee is bound by any obligation to retire its bonds under the provision referred to,

nor is it even urged that there is any probability or likelihood of its doing so. Indeed, if the injunction which appellant seeks should issue, the reasonable probabilities are that the appellee will thereafter devote its surplus funds to the payment of dividends to its stockholders.

According to the allegations of the sixth paragraph of the bill of complaint, when the sinking fund aggregates a certain amount, the trustee is required to advertise for written proposals to sell to it outstanding bonds to be purchased with such moneys and if no bonds are then offered, or the purchase price of those offered is in excess of a stated price or does not consume the whole amount of such sinking fund, then the trustee is required to redeem with such sinking fund moneys, at the redemption price, such bonds as are determined by lot, so it appears that in case no bonds are offered in response to the advertisement for written proposals, or if the purchase price of those offered is in excess of a stated price, then only are the bonds to be redeemed determined by lot. It is inconceivable that if the appellee had placed the moneys used for purchase of bonds in the sinking fund and the trustee had then advertised for proposals to sell outstanding bonds, the bondholders who sold their bonds to the company for par or less would not have offered to sell them to the trustee for par or less. In such case appellant would have had no opportunity to have had his bonds drawn for redemption, and the same bonds would have been purchased and retired as were purchased and retired by appellee in the manner complained of by the appellant.

Appellant is, therefore, confronted with the situation

that no substantial right guaranteed him under the terms of the trust mortgage is being invaded by the appellee, and with the further fact that even though he obtain the full relief sought in this suit, there is only a remote possibility that he will ever profit thereby.

This situation, we contend, does not warrant the interposition of a court of equity. There are numerous authorities holding that injunction will not lie where no substantial right of complainant is invaded or where the alleged injury is doubtful or a matter of speculation.

Ruling Case Law 14, Injunctions, Article 57, states the rule as follows: "Where an injury is trivial equity will not ordinarily interfere by injunction, even in cases where the right has been established at law; but in order to justify such interposition the injury complained of must be substantial, and not merely technical or inconsequential. A mere apprehension of future injury is not enough to warrant the issuance of a permanent injunction; it must appear to the satisfaction of the court, that such apprehension is well grounded, that is a reasonable probability that a real injury, for which there is no adequate remedy at law, will occur if the injunction be not granted. If it is doubtful or contingent equity will not interfere by injunction."

To the same effect are:

Cyc. Vol. 22, pages 758-760.

I High on Injunctions, Articles 9 and 22.

I Spelling—Injunctions and other Extraordinary Remedies, Article 12.

The rule is well stated in the Indiana case of Advance Oil Company v. Hunt. 116 N. E. 343:

"Equity intervenes to prevent loss, to afford the most effective remedy, or to prevent a multiplicity of suits, but equitable relief is not granted to protect a naked right where there is no showing that the party seeking such relief has suffered or is about to suffer substantial loss or damage. * * * Equity will not intervene to prevent the invasion of a right where such invasion would only entitle the injured party to nominal damages, nor in cases where it is doubtful, or a matter of speculation, as to whether any damages will result to the complaining party. The basis of injunctive relief is threatened irreparable damage or inadequacy of the appropriate legal remedy."

The following cases support the rule as laid down in the above case:

Dunn v. Yourmans (Ill.) 79 N. E. 323.

Gillespie Co. v. Fredericksburg Land Co. (Texas) 168 S. W. 11.

Rhodes v. Dunbar (Pa.) 98 Am. Dec. 224.

Bigelow v. Hartford Bridge Co. (Conn.) 36 Am. Dec. 502.

In re Linker, 222 Fed. 173.

Girard et al v. Lehigh Stone Co. (Ill.) 117 N. E. 698.

Tifft Co. v. State Medical Association (Wn.) 101 Pac. 1081.

No contractual right of the appellant has been violated by the appellee in purchasing and retiring its bonds in the manner complained of. If the injunction prayed for were granted, appellee could place its surplus moneys in the sinking fund and have the trustee named in the mort-

gage purchase and retire its outstanding bonds as appellee has done in the past, without any necessity to determine by lot what bonds should be redeemed at 105%, so that it is almost a certainty that appellant would derive no benefit whatever from the issuance of the injunction. Under the authorities, courts of equity do not interfere to restrain the doing of an act from which there is a remote possibility of only a fancied or nominal damage to the party praying for the injunction.

For the foregoing reasons the decision of Judge Bourquin in refusing to issue an injunction pendente lite should be affirmed.

Respectfully submitted,

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